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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 KENNETH MILLER,

10 Petitioner,

11 v.

12 ROBERT FERGUSON, Washington State
13 Attorney General,

14 Respondent.

CASE NO. C18-530RSM

ORDER ADOPTING REPORT AND
RECOMMENDATION IN PART AND
DISMISSING FEDERAL HABEAS
CORPUS ACTION

15 Petitioner, proceeding under 28 U.S.C. § 2254, seeks to challenge his state court
16 conviction on the basis of ineffective assistance of counsel. Dkts. #1 and #2. The Honorable
17 James P. Donohue, United States Magistrate Judge, thoroughly considered the Petition and
18 determined that this Court did not have subject matter jurisdiction and accordingly recommended
19 that Petitioner's action be dismissed. Dkt. #13. Petitioner has filed Objections to the Report and
20 Recommendation. Dkt. #15. Having reviewed the Objections and the rest of the record, the
21 Court adopts the Report and Recommendation in part and dismisses the Petition.
22

23 Petitioner was previously convicted of a felony offense in a Washington State court and
24 under Washington State law. Petitioner believes that his trial counsel was ineffective and that he
25 was denied his Sixth Amendment right to counsel. Dkt. #1 at ¶ 5.1. Petitioner seeks relief on
26 that basis. However, at Petitioner's request, the parties have not briefed the substantive issue and

1 instead have addressed whether Petitioner is “in custody” such that the Court has jurisdiction
2 under 28 U.S.C. § 2254.

3 By the time the Petition was filed, Petitioner had already served his jail sentence and his
4 term of community custody. Dkt. #1 at ¶ 9.1. Thus, Petitioner concedes that he is not in the
5 physical custody of the State. *Id.* However, as a consequence of Petitioner’s conviction, he may
6 not lawfully own, possess, or have a firearm under his control. REV. CODE WASH. § 9.41.040(1).
7 Petitioner maintains that this restriction on his Constitutional right is a “serious disability which
8 suffices to constitute ‘custody’ for habeas corpus purposes.” Dkt. #1 at ¶ 9.2.

10 As set forth in the Report and Recommendation, no legal authority establishes that a
11 restriction on the possession of firearms places a person “in custody” for the purpose of habeas
12 corpus petitions. Certain restraints upon the “liberty to do those things which in this country free
13 [people] are entitled to do,” can constitute custody for purposes of habeas relief. *Jones v.*
14 *Cunningham*, 371 U.S. 236, 243 (1963). But within the Ninth Circuit, “[t]he precedents that have
15 found a restraint on liberty [to constitute “custody”] rely heavily on the notion of a physical sense
16 of liberty—that is, whether the legal disability in question somehow limits the putative habeas
17 petitioner’s movement.” Dkt. #13 at 6 (quoting *Williamson v. Gregoire*, 151 F.3d 1180, 1183
18 (9th Cir. 1998)).

20 Petitioner’s Objections¹ retrace many of the same arguments he has previously advanced,
21 while adding little. On the whole, Petitioner’s arguments stretch the precedent upon which they
22 rely beyond recognition. For instance, Petitioner argues that the Report and Recommendation
23 adopts an overly rigid distinction between direct and collateral consequences of a conviction and
24

26 ¹ Petitioner’s Objections are over-length under Local Civil Rule 72. Accordingly, the Court need
not consider pages filed in excess of the applicable limit. Even so, nothing therein would alter
the Court’s decision.

1 that such an approach has been rejected by the Supreme Court. Dkt. #15 at 4–5 (relying on
2 *Padilla v. Kentucky*, 559 U.S. 356 (2010)). But *Padilla*’s consideration of direct and collateral
3 consequences was in a markedly different context and is inapplicable. The Court does not
4 understand Petitioner’s argument to be that his counsel was ineffective by failing to inform
5 Petitioner of the effect a conviction would have on his right to bear arms. This presents but one
6 instance of Petitioner’s arguments that, while convincingly made, lack an adequate legal basis.
7 In sum, Petitioner’s Objections do not establish any factual or legal errors in the Report and
8 Recommendation. Under the prevailing law and for the reasons aptly articulated in the Report
9 and Recommendation, Petitioner is not “in custody” and therefore cannot pursue this Petition.
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11 The Court does diverge from the Report and Recommendation in one regard. The Court
12 does not believe that a certificate of appealability should issue. In a habeas proceeding under 28
13 U.S.C. § 2254, a certificate of appealability should issue “only if the applicant has made a
14 substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c). A substantial
15 showing requires that “jurists of reason would find it debatable whether the petition states a valid
16 claim of the denial of a constitutional right.” *Wilson v. Belleque*, 554 F.3d 816, 826 (9th Cir.
17 2009). Where a petition is dismissed on procedural grounds, the petitioner must also show that
18 “jurists of reason would find it debatable whether the district court was correct in its procedural
19 ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As established in the Report and
20 Recommendation, Petitioner is clearly not in custody for purposes of § 2254 and the Court finds
21 that reasonable jurists would not find such a procedural ruling debatable. Accordingly, the Court
22 will not grant a certificate of appealability.
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25 Having reviewed the Petition for a Writ of Habeas Corpus, Petitioner’s Brief in Support,
26 Respondent’s Answer, Petitioner’s Response, the Report and Recommendation, Petitioner’s

1 Objections, Respondent's Response to Objections, and the remainder of the record, the Court
2 hereby finds and ORDERS:

- 3 1. The Report and Recommendation (Dkt. #13) is ADOPTED IN PART.
- 4 2. The Petition for a Writ of Habeas Corpus (Dkt. #1), and this action, are DISMISSED
5 with prejudice.
- 6 3. A certificate of appealability is DENIED.
- 7 4. The CLERK IS DIRECTED to send a copy of this Order to the parties and to Magistrate
8 Judge James P. Donohue.
- 9 5. This matter is CLOSED.

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11 DATED this 17 day of December 2018.

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14 RICARDO S. MARTINEZ
15 CHIEF UNITED STATES DISTRICT JUDGE
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